IN THE SUPREME COURT OF THE STATE OF DELAWARE

WALTER E. ROSHON,	§	
	§	No. 178, 2010
Plaintiff Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
APPOQUINIMINK SCHOOL DISTRICT,	§	C. A. No. 09A-06-004
	§	
	§	
Defendant Below,	§	
Appellee.	§	

Submitted: August 18, 2010
Decided: October 4, 2010

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

O R D E R

This 4th day of October 2010, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Walter E. Roshon ("Roshon") appeals from a Superior Court decision affirming the Unemployment Insurance Appeal Board's ("UIAB") determination that Roshon was discharged from his employment with Appoquinimink School District ("the District") for just cause and, therefore, was disqualified from receiving unemployment benefits.[1] On appeal, Roshon claims that the Superior Court erred, because the UIAB's findings, that Roshon disregarded the District's

[1] *Roshon v. Appoquinimink Sch. Dist.*, 2010 WL 1077848 (Del. Super. Ct. Mar. 2, 2010).

policy and that his offense was sufficiently related to his job performance, were unsupported by substantial evidence. Alternatively, Roshon claims that the case should be remanded to the UIAB because the District submitted its opposition to Roshon's application for unemployment benefits after the submission deadline. We find no merit to these claims and affirm.

2. From August 2003 to September 2008, Roshon was employed by the District, and worked in its Information Technology Department. On September 11, 2008, Roshon was eating lunch with his co-workers at a restaurant away from the District's property. The participants were discussing the language that Jon Besson, Roshon's co-worker, put on Art Ridley's (another co-worker) screensaver. Ridley's screensaver usually read "everything you know is wrong." Besson had changed the screensaver to read "everything Jon knows is right." As they were leaving the restaurant, Roshon suggested that Ridley's screensaver be changed to read "up yours nigger." Ridley, who is African-American, told Roshon never to use "that word" in front of him. Roshon attempted to explain that his statement was intended only as a reference to the movie "Blazing Saddles."

3. Ridley reported the incident to his direct supervisor, and later filed a complaint against Roshon with the District's Human Resources Department. On September 15, 2008, Roshon met with the District's Director of Human Resources

and with his direct supervisor. Roshon admitted to having made the offensive comment.

4. On September 15, 2008, the District terminated Roshon's employment, on the ground that Roshon's statement violated the District's anti-harassment policy, and was of such severity that it warranted termination. The District's policy prohibits serious misconduct that would "interfere with a proper teaching, learning, or work environment even if it is not unlawful." That policy defines behavior or comments that constitute prohibited "harassment" as those which a reasonable person would consider "unwelcome or offensive" or that "[r]idicule or demean a person or group based on race [or] color." The policy also identifies cultural, racial, or ethnic slurs as examples of behavior that may be considered harassment.

5. The Claims Deputy denied Roshon's application for unemployment benefits. An Appeals Referee affirmed that decision, holding that the District had just cause to terminate Roshon, who then appealed to the UIAB.

6. At the evidentiary hearing, Roshon presented the testimony of his therapist, Sandra Knauer, a licensed clinical social worker, who testified that Roshon suffers from Obsessive Compulsive Personality Disorder ("OCPD"). Knauer opined that Roshon did not intend to violate or recklessly disregard the District's policy, because he did not appreciate how his remark could be

interpreted, or its harmfulness. After hearing additional testimony, the UIAB affirmed the decision of the Appeals Referee. Roshon appealed to the Superior Court, which affirmed. This appeal followed.

7. Before this Court, Roshon claims that the Superior Court erred because the UIAB's findings—that Roshon disregarded the District's policy and that his offense was sufficiently related to his job performance—lacked substantial evidentiary support. Alternatively, Roshon claims that the case should be remanded to the UIAB on procedural grounds, because the District submitted its opposition to Roshon's application for unemployment benefits after the submission deadline.

8. This Court's appellate review of a UIAB decision "is limited to a determination of whether there was substantial evidence sufficient to support the [UIAB's] findings,"[2] and whether the decision is free from legal error.[3] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[4] It "is more than a mere scintilla, but less than a

[2] *Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

[3] 19 *Del. C.* §§ 3323, 3233(a); *Straley v. Advance Staffing, Inc.*, 984 A.2d 124 (Table), 2009 WL 3451913, at *2 (Del. Oct. 27, 2009); *McIntyre v. Unemployment Ins. Appeal Bd.*, 962 A.2d 917 (Table), 2008 WL 4918217, at *1 (Del. Nov. 18, 2008); *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

[4] *Falconi v. Coombs & Coombs, Inc*., 902 A.2d 1094, 1098 (Del. 2006) (reviewing an Industrial Accident Board decision).

preponderance of the evidence."[5] "The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings."[6] It is within the exclusive purview of the [UIAB] to judge witness credibility and resolve conflicts in testimony.[7]

9. Under 19 *Del. C.* § 3314(2), an individual who is discharged from his or her work for "just cause" is disqualified for unemployment benefits. "Just cause" has been defined as "a willful or wanton act or pattern of conduct in violation of the employer's interest, the employee's duties, or the employee's expected standard of conduct."[8] "'Wanton' conduct is that which is heedless, malicious, or reckless, but not done with actual intent to cause harm; 'willful' conduct, on the other hand implies actual specific, or evil intent."[9] The UIAB accepted Roshon's testimony that he did not intend to cause Ridley pain. It therefore held that Roshon's act was not intentional or willful. The UIAB determined, however, that Roshon had acted recklessly, by failing to take into account the effect that his words might have on other persons.

---

[5] *Id.*

[6] *Id.*

[7] *Straley*, 2009 WL 3451913, at *3 (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

[8] *Avon Prod., Inc. v. Wilson*, 513 A.2d 1315, 1317 (Del. 1986).

[9] *Tuttle v. Mellon Bank of Del.*, 659 A.2d 786, 789 (Del. Super. Ct. 1995).

10. Roshon claims that the UIAB's latter holding is not supported by substantial evidence, because the UIAB ignored Ms. Knauer's testimony that Roshon did not recklessly violate the District's policy. The UIAB, however, did not find her testimony "particularly helpful," because she did not testify that Roshon's mental-health condition caused him to make the offensive remark.

11. Relying on *Amalfitano v. Baker*,[10] Roshon argues that the UIAB erred in disregarding Knauer's testimony because it was "unrebutted," and must therefore be deemed conclusive absent any contrary evidence that Roshon recklessly disregarded the District's policy. In *Amalfitano*, we held that "where medical experts present uncontradicted evidence of injury, confirmed by objective medical tests supporting a plaintiff's subjective testimony about her injuries and offer opinions that the injuries relate to the accident about which the plaintiff complains, a jury award of zero damages is against the weight of the evidence."[11] Roshon's reliance on *Amalfitano* is misplaced, because that case addressed "uncontradicted medical evidence of injuries and their proximate cause" presented by *a plaintiff* in a jury trial.[12] Here, Roshon is not a plaintiff who had the burden of proof. It was the *District* that was required to prove, by a preponderance of the

[10] 794 A.2d 575 (Del. 2001).

[11] *Id*.

[12] *Id*. at 577.

evidence, the existence of "just cause" for Roshon's termination.[13] Even if Knauer's testimony is regarded as medical expert testimony,[14] it could not be deemed "unrebutted," since it was offered to controvert the District's showing of "just cause." The Superior Court correctly held that the UIAB was entitled to disregard Knauer's opinion entirely, even if it was not controverted by other evidence:

> [T]he [UIAB] simply concluded that Roshon's OCPD diagnosis did not necessarily cause him to make the slur, nor did it excuse his behavior. Resolving disputes of facts and credibility is the exclusive province of the UIAB, which has the sole discretion to discount the testimony of any witness it does not deem to be believable.[15]

12. In finding that Roshon had recklessly violated the District's anti-harassment policy, the UIAB relied on substantial evidence. Roshon had actual notice of the District's policy, and had previously filed complaints pursuant to that policy. The District's policy specifically stated that racial slurs or innuendo constitute prohibited harassment. Thus, even if Roshon did not appreciate the harmfulness of his statement, he knew that under the District's policy, he should

---

[13] *Diamond State Port Corp. v. Ferguson*, 2003 WL 168635, at *2 (Del. Super. Ct. Jan. 23, 2003).

[14] The Superior Court noted that Knauer's testimony linking Roshon's OCPD to his use of a racial slur "is not only *not* the opinion of a medical expert, but so unscientific and illogical that even a lay person would question the soundness of her opinion." *Roshon v. Appoquinimink Sch. Dist.*, 2010 WL 1077848, at *4 n.19 (Del. Super. Ct. Mar. 2, 2010) (emphasis in original).

[15] *Id*. at *4.

not be making racial "jokes." Because Roshon was aware of the policy, his violation was reckless and, thus, sufficient to justify his termination.

13. Before the UIAB, Roshon argued that because the incident occurred during an uncompensated lunch period away from the District's premises, Roshon's offense was not sufficiently related to his job performance and, therefore, did not constitute "just cause *in connection with* [Roshon's] *work.*"[16] The UIAB held that there was a "sufficient nexus between the off-site misconduct and [Roshon's] job performance,"[17] because Roshon's conduct harmed the District's interests by disrupting a relationship between employees who needed to work together. On appeal, Roshon claims that that finding is not supported by substantial evidence, because there was no proof that Roshon's and Ridley's working relationship was actually affected by the offensive comment. The record shows otherwise.

14. In its decision, the UIAB explicitly found that "Ridley testified credibly before the [UIAB] that he was very upset by [Roshon's] use of such racially charged language." The UIAB then concluded that regardless of whether Roshon was "insufficiently sensitive" or Ridley was "overly sensitive" about Roshon's language, Ridley's reaction to it was sufficient to establish that it disrupted the two

[16] 19 *Del. C.* § 3314(2) (emphasis added).

[17] *Baynard v. Kent County Motor Sales Co.*, 1988 WL 31972, at *1 (Del. Super. Ct. Mar. 10, 1988).

employees' working relationship. It is not for us to disturb the UIAB's determination of Ridley's credibility, or make our own finding regarding how Roshon's comment affected his relationship with Ridley. Roshon's second claim of error is without merit.

15. Roshon's final claim is that the District filed an untimely opposition to his claim for benefits. Under 19 *Del. C.* § 3317(b), where a terminated employee files a claim for unemployment benefits, the employer is sent a "separation notice" and is required to return that notice "within 7 days of the date contained on the separation notice."[18] Section 3317(b) further provides that an employer that fails to timely return a separation notice within that period "shall be barred from claiming subsequently that the [terminated employee is] disqualified under any provisions of § 3314 … unless the Department [of Labor] for reasons found to constitute good cause, shall release such employer from the default."[19] The District filed its response to the separation notice regarding Roshon on October 14, 2008—four days after the statutory deadline.[20] On January 5, 2009, when the

[18] 19 *Del. C.* § 3317(b).

[19] *Id*.

[20] Roshon's claim that the District was four days late in responding to the notice relies on an incorrect date (October 8, 2008) stated on the cover page of the fax transmittal of the response. Although we assume that Roshon's calculation is correct, we note that the notice itself states that the requested response date was October 12, 2008 (a Sunday) and, therefore, that the District was only one day late in filing its response.

Claims Deputy denied Roshon's application for benefits, the Deputy executed a waiver, for "good cause," of a timely filing by the District.

16. Roshon argues, for the first time on this appeal, that the record reveals no evidence of good cause for the District's delay. Roshon, therefore, requests that his case be remanded to the UIAB to determine why the waiver for good cause was granted and, accordingly, whether he was wrongfully denied unemployment benefits.[21] Because that claim was not fairly presented to the Superior Court, it may not be raised on this appeal, unless the interests of justice so require.[22]

17. Roshon contends that the interests of justice require us to review this claim because "the existence of a waiver is hidden from the claimant unless he or she requests the record in the case." Even if true, that does not explain why Roshon did not first advance this claim in the Superior Court. Nor does Roshon contend that the District's four-day delay prejudiced him in any way. Thus, there is no basis to remand the case to the UIAB.

---

[21] Roshon's request that the case be remanded for an evidentiary hearing relies on the Superior Court's holding in *Bailey v. Printpack, Inc.*, 2006 WL 1148668 (Del. Super. Ct. Mar. 17, 2006) (remanding the case to the UIAB to determine whether there was a good cause for the employer's delayed response). Here, unlike in *Bailey*, a "good cause" determination was actually made and a waiver was granted. Therefore, judicial review of the decision to grant a waiver would be limited to whether the UIAB abused its discretion in so doing. *See Rodney Square Bldg. Restorations, Inc. v. Noel*, 2008 WL 2943376, at *4 (Del. Super. Ct. Jul. 22, 2008). Because Roshon was not prejudiced by the waiver, and because denial of the District's right to challenge Roshon's eligibility for benefits due to a mere four-day delay in response would not serve the ends of the statute, it is unlikely that the UIAB abused its discretion in granting the waiver.

[22] DEL. SUP. CT. R. 8.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice